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HIGHLIGHTS

Ontario Labour Relations Board

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in May of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Duty of Fair Representation – Discharge – The applicants challenged their union's settlement of discharge grievances without their consent – After an exhaustive investigation including video surveillance and computer intervention, the employer discharged the applicants for time theft and misuse of company property (the applicants were alleged to have contributed to an alternative workplace website which contained disparaging and false comments regarding the employer and its employees) – The applicants maintained their innocence and objected to any settlement overtures – The Board held that a s. 74 application is not a substitute for arbitration; the process is not a forum for assessing the correctness of the union's decisions, and the trade union is well within its rights to settle a grievance absent the grievor's consent – Finally, the Board found no violation of s. 87 of the Act when the union discontinued an internal appeal once the applicants had launched the instant complaint – Application dismissed

ANDREW BIRNIE et al; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222; RE ACSYS AUTOMOTIVE COMPONENT SYSTEMS OF CANADA A DIVISION OF BBK, MICHIGAN; File No. 3243-04-U; Dated May 24, 2006; Panel Peter F. Chauvin (14 pages)

Construction Industry Grievance – *Human Rights Code* – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary, discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

E.S. FOX LTD.; RE UA; File No. 4243-05-G; Dated May 1, 2006; Panel: Corinne F. Murray; G. Pickell; A. Haward (7 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during

cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183; File No. 0330-04-R; Dated May 31, 2006; Panel: Jack J. Slaughter; John Tomlinson; Alan Haward (12 pages)

Consent to Prosecute – Contempt – Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000; File Nos. 1684-05-U; 3719-05-U; Dated May 9, 2006; Panel: Mary Anne McKellar; R. O'Connor; R.R. Montague (11 pages)

Bargaining Rights – Employer Initiation – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK; RE MICHAEL MCLELLAN; RE OPSEU LOCAL 278; File No. 4276-04-R; Dated May 4, 2006; Panel: Patrick Kelly (7 pages)

Discharge – Duty of Fair Representation – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's second and third terminations; when it advised the applicant to accept an agreed statement of facts at arbitration; and when it entered into a Letter of Understanding with the employer – In its assessment of whether section 74 had been breached, the Board considered the grievor's conduct and found the applicant was uncooperative and antagonistic towards the union so as to irreparably fracture their relationship – Moreover, the applicant began to disregard the union's instructions and posted notices on the union's website alleging that the union business manager was stealing from the employer – When the union ordered the applicant to remove the postings the applicant ignored the union's warnings – The Board held that where a grievor fails to cooperate with a union, so that the union is unable to productively work with the grievor, or is unable to properly prepare for an

arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance – Application dismissed

STEPHANE VERREAULT; RE TEAMSTERS UNION LOCAL 419; RE UA LOCAL 787; File No. 0840-05-U; Dated May 30, 2006; Panel: Peter F. Chauvin (10 pages)

Discharge – Construction Industry Grievance – Practice and Procedure – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50; File No. 2831-05-G; Dated May 12, 2006; Panel: Norm Jesin (6 pages)

Practice and Procedure – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE MIKE SMITH et al; File No. 0618-06-U; Dated May 29, 2006; Panel: Kevin Whitaker (4 pages)

Lock-Out – Strike – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

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TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al; File Nos. 0618-06-U; 0620-06-U; Dated May 29, 2006; Panel: Brian McLean (2 pages)

Health and Safety – The applicant employer appealed and sought a suspension of an Order requiring it to provide a readily available hard copy of material safety data sheets (MSDS) to all workers who are potentially at risk of exposure to hazardous materials – In its submissions on the suspension request, the employer argued that the workers have easy access to MSDS through a CD-Rom program and computer system; that it would be too onerous to maintain, regularly update and locate correct MSDS using a hard copy version; and that whatever retrieval problems existed with the computer system had been corrected since the Inspector's visit – An employee member of the Joint Health and Safety Committee filed a response in support of the employer's position, submitting that the current CD-Rom program is more time efficient and accessible for workers than the prospect of searching through the hard copy for MSDS – The Board found that the employer would suffer harm if it was required to comply with the Order pending

the appeal; the suspension of the Order would not endanger worker safety because the company's retrieval system appeared to allow workers to quickly access the correct MSDS; and the applicant had *prima facie* grounds for a successful appeal – Suspension request granted

UNITED LUMBER & BUILDING SUPPLIES CO. LTD.; RE DOUGLAS WEST; File Nos. 0479-06-HS; 0480-06-HS; Dated May 31, 2006; Panel: Susan Serena (3 pages)

Court Proceedings

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB; File Nos. 1271-03-U; 1336-03-M; 1414-03-M; (Court File No. 10/04); Dated May 31, 2006; Panel: O'Driscoll, Matlow, Jarvis, JJ (27 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	Pending
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 254/06	4212-05-G; 4213-05-G	Pending
Place Mont Roc v. United Steelworkers (Stated Case) Divisional Court No. 233/06	1684-05-U; 3719-05-U	Pending
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Sept./Oct. 2006
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Pending
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	Oct. 31, 2006
Bricklayers Local 7 v. 921879 Ontario Ltd. et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Sept./Oct. 2006
Kostantinos Iaonnidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	August 30, 2006
United Brotherhood of Carpenters v. United Brotherhood of Carpenters, Local 93 Divisional Court No. 01/06	2069-05-U; 3055-05-M	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 NEWMARKET	3704-04-U	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Dismissed – May 31, 2006

Case name & Court File No.	Board File No.	Status
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Dismissed – April 13, 2006, seeking leave to appeal to C.A.
Naseem Jamal v. OPSEU et al Divisional Court No. 567/04	2464-03-U	Leave to C.A. dismissed Feb. 3/06, seeking leave to SCC
Joseph S. Rooke v. OLRB and Stelco Hamilton Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	June 27, 2006
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Pending